IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 20TH NOVEMBER 2007 / 29TH KARTHIKA 1929

SA.No. 369 of 1994()

AS.15/1991 of I ADDL.DISTRICT COURT, ERNAKULAM
OS.151/1989 of PRINCIPAL SUB COURT,KOCHI
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APPELLANT: APPELLANT:PLAINTIFF:

TRAVANCORE COCHIN CHEMICALS LTD.,
UDYOGAMANDAL POST, ELOOR,
REPRESENTED BY ITS CHAIRMAN AND
MANAGING DIRECTOR.

BY ADV. SRI.E.R.VENKATESWARAN

RESPONDENTS: RESPONDENTS:DEFENDANTS:
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1. **THE COMMERCIAL MANAGER,**
   SOUTH REGION, INDIAN AIRLINES,
   19, MARSHALLS ROAD, MADRAS – 600 008.

2. **THE AIRPORT MANAGER,**
   INDIAN AIRLINES, CARGO DEPARTMENT,
   COCHIN AIRPORT, COCHIN – 682 003.

BY ADV. SRI.A.M.SHAFFIQUE for R1 & R2

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

lM.SASIDHARAN NAMBIAR, J.

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S.A.No. 369 OF 1994

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DATED THIS THE 20th DAY OF NOVEMBER, 2007

JUDGMENT

Plaintiff in O.S.151 of 1989 on the file of Sub Court, Cochin is the appellant. Defendants are the respondents. Suit was filed for realisation of damages caused to the consignment sent through Indian Airlines flight. Appellant placed orders with a West German Company for purchase of spare parts of the machinery. The consignment was sent from Frankfurt, West Germany to Cochin. It was sent by Swiss Air from Frankfurt to Bombay. From Bombay it was rebooked to Cochin by Indian Airlines flight. The goods arrived at Cochin Airport. As per letter dated 18.9.1987, appellant was directed to take delivery of the goods after customs clearance. Appellant contended that on verification of the spare parts of the machinery, it was found that damages were caused to the machinery. Surveyors were instructed to assess the damages. The Surveyor, under Ext.A11 report, fixed the damages at Rs.13,271/-. Suit is filed for realisation of the same with interest @ 18% per annum contending that damage was caused due to the negligent act of respondents. Respondents resisted the suit contending that

consignment was sent from Frankfurt to Bombay and from Bombay to Cochin on a consolidated cargo and the first leg of transport from Frankfurt to Bombay was by Swiss Air and it was booked for delivery to the consignee, at Bombay through Indian Airlines and suit is bad for non-impleading the Swiss Air. It was also contended that notice was not issued within 14 days of taking delivery and damage was not caused by respondents and hence appellant is not entitled to the decree sought for.

2. Learned Sub Judge, on the evidence of Pws 1 to 3, DW1, Exts.A1 to A23 and Exts.B1 to B4, dismissed the suit holding that though Ext.A11 Survey report establish that appellant suffered damages in respect of the consignment, suit is bad for non-impleading of Swiss Air through which the consignment was sent from Frankfurt to Bombay. It was also found that there is no evidence to prove that damage was caused to the consignment while it was being carried from Bombay to Cochin. Appellant challenged the judgment before District Court, Ernakulam in A.S.15 of 1991. Learned Additional District Judge, on reappreciation of evidence, found that under Section 30(3) of Carriage by Air Act, 1972, (hereinafter referred to as the 'Act') carriers will be jointly and severally liable to the passenger or to

the consignor or consignee and as the liability is joint, suit is not bad for non-impleadment of Swiss Air as case of appellant was that damage was caused while consignment was transmitted from Bombay to Cochin. But on the evidence, it was found that there is no evidence to prove that damage was caused when the consignment was taken from Bombay to Cochin and evidence of DW1 establish that no damage was caused by respondents. Therefore the dismissal of the suit was confirmed. It is challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1)Whether on the facts and circumstances of the case, Swiss Air is a necessary party.

2)Whether on the facts and circumstances of the case, defendants discharged their burden as a carrier.

3)Whether on the facts and circumstances of the case, defendant as bailee has to explain how goods have been dealt with.

4. Learned counsel appearing for appellant was heard. The argument of the learned counsel is that courts below should have found that the machinery which was entrusted for consignment was got damaged when it was carried by

respondents and on the evidence it should have been found that respondents did not discharge their burden. It is therefore argued that appellant is entitled to the decree sought for.

5. Admittedly machineries were sent from Frankfurt to Cochin on a consolidated cargo. The first leg of the transport was from Frankfurt to Bombay. That consignment was sent by Swiss Air. It is thereafter the consignment was rebooked from Bombay to Cochin. Damages was claimed from the respondents on the allegation that the consignment delivered to the appellant at Cochin was found damaged and the said damage was caused by the negligence of respondents. The argument of the learned counsel is that respondents did not succeed in establishing that damage was not caused by their negligence and as damage was not caused when the consignment was from Frankfurt to Bombay, only respondents are liable. Learned Sub Judge found that without impleading the Swiss Air, suit for damages as against defendants is not maintainable. Learned Additional District Judge relied on Section 30(3) of the Act and found that the liability of the carriers is joint and several and if damages is caused by one of the carrier, suit as against the carrier is maintainable without impleading the other carrier and the

allegation is that damage was caused by respondents and so suit is maintainable even though Swiss Air was not impleaded.

Section 30(3) of the Act reads:-

> "As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage, or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee".

6. Even if the view taken by learned Additional District Judge is correct, suit against respondents alone would lie,

without impleading the Swiss Air which was the first carrier through which the consolidated cargo was sent from Frankfurt to Bombay, only on establishing that no damage was caused to the consignment while it was being transmitted from Frankfurt to Bombay and proving that damage was caused only while it was transmitted from Bombay to Cochin. There is absolutely no evidence to prove that damage was caused while the consignment was transmitted from Bombay to Cochin. Evidence of DW1 establish that consignment as received at Bombay at the time of re-booking the cargo and it was delivered to appellant at Cochin in the same condition. Appellant did not adduce any satisfactory evidence to prove that no damage was caused to the consignment before it was transmitted from Bombay to Cochin. If that be the case, on the evidence first appellate court rightly found that appellant did not establish that the damage was caused while the consignment was transmitted from Bombay to Cochin. Therefore, I find no merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

SA 369/1994

JUDGMENT

20.11.2007